

No. 23-6697

ORIGINAL

FILED

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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Jorge Hernandez

— PETITIONER

(Your Name)

VS.

United States of America

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jorge Hernandez, # 43994-004

(Your Name)

Federal Correctional Complex  
P.O. Box 1031 (Low Custody)

(Address)

Coleman, FL 33521-1031

(City, State, Zip Code)

N/A

(Phone Number)

### **QUESTION(S) PRESENTED**

In order to permit meaningful appellate review of whether a court properly exercised its discretion, a court must provide at least a brief statement of reasons with its order. The appellate court summarily denied Jorge Hernandez's motion to recall the mandate, providing no reasoning. Did the appellate court abuse its discretion by failing to provide any reasoning to permit meaningful appellate review?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

United States v. Hernandez, Appeal No. 16-17349 (11th Cir.)

United States v. Hernandez, No. 1:16-cr-20109-FAM-1 (S.D. Fla.)

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## OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix   A   to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

N/A The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Apr. 27, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Aug. 21, 2023, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1): Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: [¶] (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2106: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the court entry of such appropriate judgment, decree, or order, or request such for the proceedings to be had as may be just under the circumstances.



## STATEMENT OF THE CASE

On February 10, 2016, Jorge Hernandez was arrested and charged for illegal distribution of drugs. On September 5, 2016, Hernandez pleaded guilty to a single count of a lesser included offense under 21 U.S.C. § 841(b)(1). He was then found by the probation office to qualify as a career offender, as he had three controlled substance convictions involving conspiracy with intent to distribute cocaine and an attempted murder charge. See PSR ¶ 42. Because the sentencing guidelines for the drug weight was higher than that for the career offender guideline, Hernandez was found to have a guideline level 33. Id. ¶ 45. Despite his having 8 criminal history points, the career offender enhancement increased Hernandez's criminal history Category to VI, or 235-293 months. Id. ¶ 53. The district court granted a downward variance at sentencing to 210 months imprisonment. Doc. 213 at 15. Hernandez appealed. Doc. 195.

On direct appeal, Hernandez argued among other things that he was incorrectly designated as a career offender because his felony convictions for controlled substances were ineligible to meet the criteria for the career offender designation. The government responded that there was no authority supporting Hernandez's position that his controlled substance offenses were not career offender predicates. The appellate agreed with the government's reasoning, and affirmed Hernandez's sentence.

In January 2023, the Eleventh Circuit issued the en banc opinion United States v. Dupree, No. 19-13776 (11th Cir. Jan. 18, 2023)(en banc). The Dupree court specifically found that § 4B1.2(b)'s definition of a controlled substance offense clearly "does not include inchoate offenses," and that including conspiracy offenses as viable predicates was error. Dupree, No. 19-13776, Doc. 74-1 at 3. The court further elaborated that this error, made over

10 years prior to the court's Dupree holding, was "incorrect at the time" it was issued. Id., Doc. 74-1 at 22 n.9 (citing United States v. Weir, 51 F.3d 690 (11th Cir. 1995)).

On February 17, 2023, Hernandez filed a motion to recall the mandate. App. C. Hernandez argued, among other things, that because he was not a career offender on appeal, and because the appellate court's decision in his appeal was now necessarily wrong, his circumstances justified recalling the mandate. Id. The government did not file a response. On April 27, 2023, the appellate court in response issued a summary denial panel order stating: "Appellant's motion to recall the mandate based on United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) is DENIED." App. A. No reasoning was given for the denial. Id.

On May 15, 2023, Hernandez filed a timely motion for reconsideration. App. D. Hernandez argued that the appellate court's failure to provide any reasoning as to its denial of the motion to recall the mandate deprived Hernandez of his right to seek appellate review in the Supreme Court. Id. at 2. On August 21, 2023, the Eleventh Circuit again issued a summary denial. App. B. Hernandez now timely files his petition for writ of certiorari.

## REASONS FOR GRANTING THE PETITION

The courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion. Hawaii Housing Authority v. Midkiff, 463 U.S. 1323, 1324 (1983). "Discretion is not a whim." Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005). A "motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." Ibid. The court deciding the motion must clearly articulate their reasoning in order to permit "meaningful appellate review." Gall v. United States, 552 U.S. 38, 50 (2007). The absence of such reasoning is "merely an abuse of that discretion." Foman v. Davis, 371 U.S. 178, 182 (1962).

The appellate court, in reviewing an original motion filed solely in the appellate court, abused its discretion. There are no orders from a lower court to affirm, or other orders or opposing motions to adopt to allow any meaningful appellate review in this court. Through its silent reasoning, the appellate court essentially prevented Hernandez from being able to seek review of his motion. See 28 U.S.C. §§ 1254(1), 2106.

Moreover, Hernandez's mandamus petition was not frivolous. In Hernandez's criminal appeal, the appellate court resolved the career offender issue in error because of wrongly decided precedent, and it was only years later with the en banc court's reasoning in Dupree that Hernandez was vindicated. Hernandez never should have been designated a career offender, and was sentenced at least 25 months higher because of the incorrect designation and guideline. This was an injustice, and the appellate court was required to at least consider Hernandez's arguments.

Nor was Hernandez's recall the mandate motion untimely. The Eleventh Circuit's local rules specifically account for motions to recall the mandate that are not filed within three years of the current judgment, where the movant must state "with specificity why it [the motion] was not filed sooner." 11th Cir. R. 41-1(b). Hernandez provided his explanation; he filed as soon as Dupree changed the law and showed that its previous decision was in error at the time it was made.

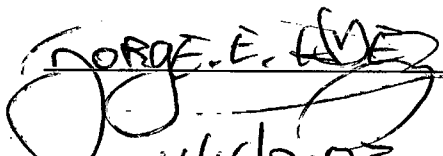
By not permitting Hernandez any reasoning as to its denial of his recall the mandate motion, the appellate court has truncated his right to seek review in this court. This is not only bad policy overall, it fosters a negative public perception of the appellate court. The appellate court either appears to be intentionally truncating Hernandez's rights, or too busy to resolve the error that it propagated as it later acknowledged in Dupree. This was at Hernandez's expense, and directly lead to his over-incarceration. This is worth at least consideration by the appellate court.

This court should grant Hernandez's petition for certiorari, vacate the court's order, and instruct it to provide reasoning as to why it denied Hernandez's motion so that he may seek further review in this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
Date: 11/16/2023